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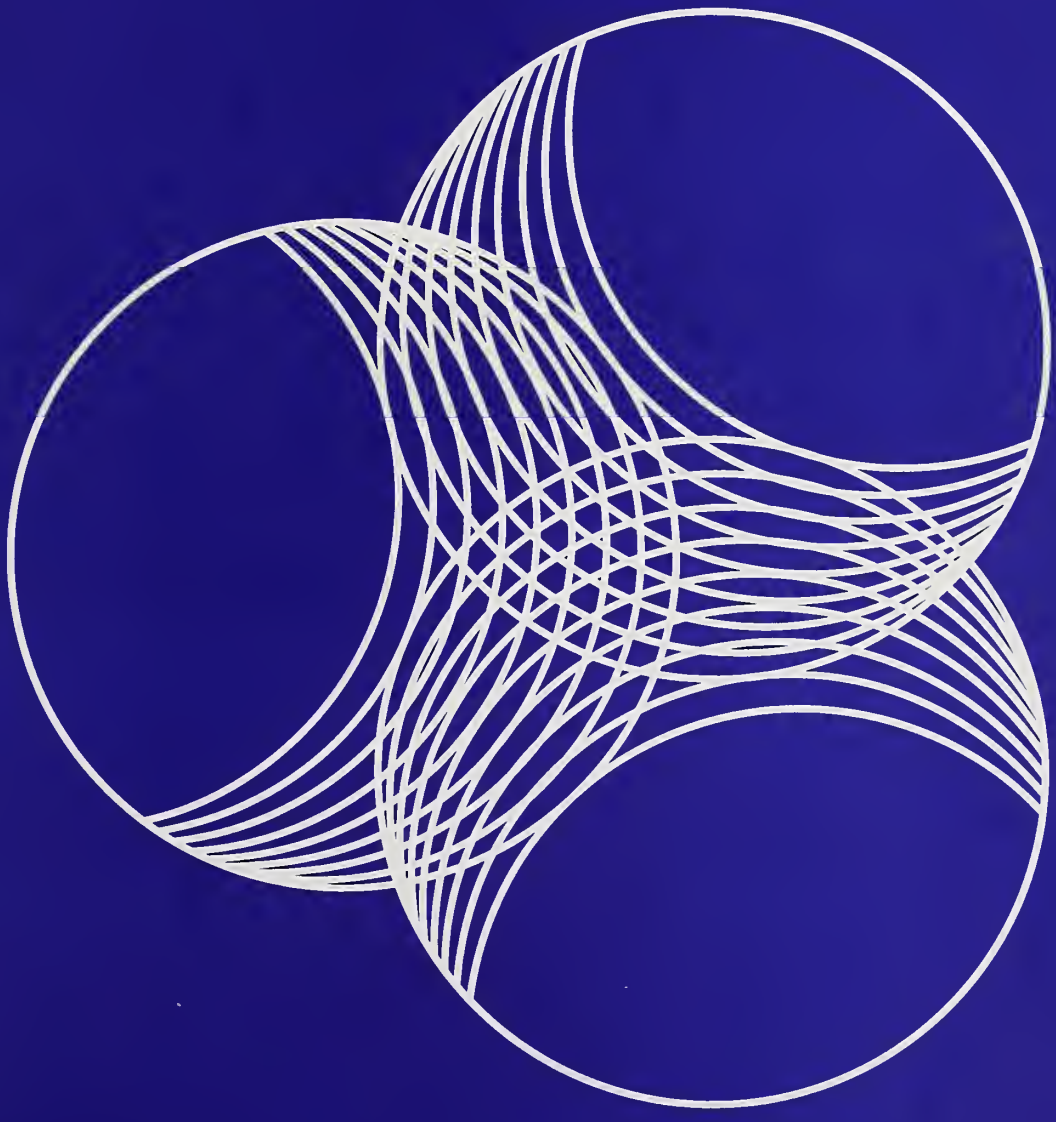
Federal and State Regulations of Food Product Safety and Quality

A Selected, Partially Annotated Bibliography

Julie A. Caswell



FEDERAL AND STATE REGULATIONS OF FOOD PRODUCT SAFETY AND QUALITY: A SELECTED, PARTIALLY ANNOTATED BIBLIOGRAPHY. By Julie A. Caswell, Commodity Economics Division, Economic Research Service, U.S. Department of Agriculture. Bibliographies and Literature of Agriculture No. 70.

ABSTRACT

This bibliography contains citations of research on Federal and State regulations of food product safety and quality. The annotated portion emphasizes articles on jurisdictional conflict between Federal and State regulations of food products and the use of Federal preemption to limit conflict. The second portion is a bibliography of economic, legal, and public health research on regulatory policies and individual Federal and State food regulations. It is organized into four subsections: regulatory theory and effects, food purity and safety regulations, food standards and labeling regulations, and food selling practices regulations.

Keywords: Federal and State regulations, food safety, food quality, Federal preemption

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CONTENTS

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INTRODUCTION

Regulation of food product safety and quality by Federal and State governments is extensive and complex. Economic and legal analyses of the purposes, operations, and effects of this regulation are, in contrast, relatively sparse. This bibliography provides citations to these analyses, particularly those published since 1975.

Jurisdictional conflicts between Federal and State governments, and sometimes international governments, have increased as regulating food product safety and quality has become more complex. Some areas of food safety and quality regulation have been preempted by the Federal Government, leaving no room for State initiative. In other areas, jurisdiction is shared. Conflict usually arises when Federal law is unclear about the degree of preemption. In these cases, States may enact regulations that are inconsistent with or stricter than Federal Government regulations.

This report will serve as a resource for anyone involved in or studying the problem of jurisdictional conflicts in Federal, State, and international regulations of food product safety and quality.

An annotated section cites articles on the relative advantages of State, Federal, and international regulations, the benefits and costs of nonuniform regulations, and important court precedents in food regulation preemption costs.

The remainder of the report contains citations of economic, legal, and public health research on individual areas of food product safety and quality regulations. While jurisdictional issues may arise in these areas, the focus of these articles is on the formation, operation, and effect of Federal and State regulations of food products.

The author is assistant professor of agricultural and resource economics at the University of Massachusetts at Amherst. This bibliography was prepared for the Economic Research Service as part of Cooperative Agreement No. 58-3J23-4-00273.

JURISDICTIONAL CONFLICT BETWEEN STATE, FEDERAL, AND INTERNATIONAL REGULATION: AN ANNOTATED BIBLIOGRAPHY

This annotated section includes citations of articles dealing chiefly with jurisdictional conflicts between Federal and State regulations and, in some cases, international regulations.

Food Regulation

This section deals with citations on jurisdictional conflict in food product safety and quality regulation. The relative advantages of State, Federal, and international regulations are discussed, as well as the benefits and costs of nonuniform regulation. Articles cited also cover important court precedents in food regulation preemption cases.

Alsop, Ronald. "Countries' Different Ad Rules are Problem for Global Firms," Wall Street Journal, Sept. 27, 1984, p. 33.

Restrictions have become a serious problem for advertisers as more countries regulate the content of advertisements. The diversity of government restrictions makes it difficult to create a universal ad campaign that can be used in several countries. There has been a recent push to restrict ads for cigarettes, children's products, liquor, and pharmaceuticals. Nationalistic policies are also curbing advertisers' freedom since more countries now require local production of at least a portion of some advertisements.

Caswell, Julie A. "Federal Preemption, State Regulation, and Food Safety and Quality: Major Research Issues," Consumer Demands in the Marketplace: Public Policies Related to Food Safety, Quality, and Human Health. Katherine Clancy (ed.). Resources for the Future, National Center for Food and Agricultural Policy, Washington, DC, 1988, pp. 129-37.

The degree of preemption of State food regulation is a continuous policy variable, ranging from none to complete, that is controlled by the Federal Government. Where this degree is not clearly stated in Federal law, State regulatory actions may result in market disarray while jurisdiction is decided in the courts or rewritten by Congress. The cases of the pesticide ethylene dibromide (EDB) and daminozide residues in food are cited as examples. The article discusses the advantages and disadvantages of Federal and State regulations, directions for research on regulatory conflict, and the major policy issues.

Craig, Steven G., and Joel W. Sailors. "Interstate Barriers to Trade in a Federalist Economy." (Mimeo) Department of Economics, Univ. of Houston, Houston, TX, 1984.

The distribution of effects from interstate barriers to trade erected by individual States varies, depending on the type of barrier. While export taxes attempt to export costs and import benefits from neighboring States, import trade barriers have the effect of redistributing income among groups within the State. This report develops models of these two types of barriers and the motivations for each, empirically examines State purchasing preference laws as an example of the second type of barrier, and argues that these barriers as a group significantly distort the U.S. economy. Actions that Governments could take to limit the disruptive

effect of interstate barriers include Supreme Court decisions limiting such laws, Federal legislation providing guidelines for the type of barriers that are permissible, and State use of reciprocal laws that drop barriers against other States using these laws.

Delville, R. "Reception of International Food Standards in National Legislation," Food Drug Cosmetic Law Journal 33 (1978): 292-304.

This article distinguishes between the acceptance of an international standard and its integration into national law, describes the rulemaking powers of different international organizations (for example, European Economic Community (EEC) versus Codex Alimentarius Commission), and discusses British, French, German, and Benelux standards adoption procedures.

Downey, M. "Laboratories or Puppets--Challenge of Federal Preemption of State Legislation," Food Drug Cosmetic Law Journal 37 (1979): 334-69.

Several court cases in the seventies seem to have begun a redefinition of the limits of the Federal Government's ability to preempt or force State regulatory activity. In determining whether a conflict exists between Federal and State laws, the courts will consider the congressional intent, the nature of the conflict, the burden on interstate commerce, and the purposes of the State law. Downey argues that unless State regulatory powers are protected States will become puppets or functionaries of the Federal Government and lose their role as laboratories for designing regulations to fit local needs. Downey discusses the Medical Device Amendments of 1976 as an example of broad preemption of State regulation that had unanticipated results complicated by the delegation of the preemption authority by Congress to the Food and Drug Administration (FDA).

Fisher, F. E. "Federal/State Concurrent Regulation," Food Drug Cosmetic Law Journal 29 (1974): 20-26.

Federal and State governments have concurrent jurisdiction in food and drug legislation. State activity is often hampered by a lack of funds for enforcement, a lack of expertise in arguing court cases, and conflicts between protecting consumers and encouraging business activity in the State. Fisher argues that State activity should, however, remain strong and not be preempted by the Federal Government because the States are a proving ground for new legislative approaches, are relied on by the Federal Government in enforcement activities, and can, through coordinated efforts, effectively regulate many areas without Federal Government involvement.

Foote, S. B. "Changing Regulatory Strategies--What Managers Should Know About Federal Preemption," Sloan Management Review, Fall 1984, pp. 69-73.

After initial enthusiasm, there are growing signs in the business sector of a rejection of the Reagan administration's new federalism. Many industries prefer uniformity through Federal preemption to the multiplicity of State regulations that result from the new federalism. The keystone of these industries' new strategy is to promote Federal regulation only if it preempts or invalidates existing or contemplated State laws. Possible pitfalls for industry of this new strategy are lengthy challenges of preemptive Federal regulations that are less protective than State regulations, court reviews of Federal agencies' implementation of Federal

law, and active use of new Federal regulatory authority by subsequent administrations.

Frank, R. L. "Food Labeling--Case for National Uniformity," Food Drug Cosmetic Law Journal 34 (1979): 512-24.

This article discusses bases of Federal preemption under various food labeling regulations. In both the Rath Packing (1977) and Cosmetic, Toiletry, and Fragrance Association, Inc. (1978) cases, the courts sustained preemption theories under the Food, Drug, and Cosmetic Act in the absence of express preemptive language and direct conflict between Federal and State legislations. The courts sustained preemption theories on the basis that the State regulation was an obstacle to congressional purposes and objectives.

Gaines, Robert. "Proposed Massachusetts Nutritional Labeling Regulations: Confronting the Question of Federal Preemption," New England Law Review 11 (1976): 541-64.

States have the right to regulate the food industry despite existing Federal regulation. States can impose this regulation if they can demonstrate that the regulation does not conflict with Federal regulation but rather is a supplement, and if there is no evidence that Congress intended to exclude further regulation in that field. Several legal cases are cited to illustrate these points.

Gerard, A. "International Food Standards and National Laws," Food Drug Cosmetic Law Journal 33 (1978): 281-91.

There are three general methods to develop and implement international food standards. The first is through a direct international agreement on a particular standard which is then accepted by individual nations. The second is through an international agreement to establish an institutional structure that develops standards that are then accepted by the member States. The third, which is most widely used, is through the development of technical standards by governmental (for example, the joint Food and Agriculture Organization and World Health Organization (FAO/WHO) Codex Alimentarius Commission) or nongovernmental (for example, the International Organization for Standardization) organizations. These standards are then recommended to individual States for unilateral acceptance. This article describes a broad range of efforts to establish international standards and discusses several obstacles these efforts face.

Hancock, Mary. "Federal Jurisdictional Disputes in the Labeling and Advertising of Malt Beverages," Food Drug Cosmetic Law Journal 34 (1979): 271-88.

This article traces regulation of the labeling and advertising of malt beverages from 1933 to 1977. States retained considerable power to regulate these products. On the Federal level, the Bureau of Alcohol, Tobacco and Firearms (BATF) has been regulating labeling by agreement with the FDA, and the Federal Trade Commission (FTC) has been regulating advertising. Recent activity of BATF and FTC, however, has generated jurisdictional conflicts.

Hensel, Harvey L. "Federal State Concurrent Regulations--What Can We Do to Help the System Work?" Food Drug Cosmetic Law Journal 29 (1974): 119-23.

Efforts to block nonuniform food regulations passed by State and local governments are most likely to be successful where (1) Federal law has clear preemption clauses or (2) the FDA already expressly regulates the product on a compulsory basis. Much less success is likely where (3) Federal regulation is voluntary or (4) absent. Reductions in nonuniformity may be achieved by moving Federal regulation out of categories 3 and 4 into categories 1 and 2.

Jones, Stephen. "Federal and State Economic Regulation--A Preemption Problem," Hastings Law Journal 17 (1966): 619-25.

This article argues that the Supreme Court's decision in Florida Lime and Avocado Growers, Inc. versus Paul (1963) that upheld California's avocado maturity rules was inconsistent with the Court's rulings in three other similar cases of conflicting economic regulations. The article also discusses the standard tests used by the Court in preemption cases.

Kaplan, Harvey L., and Rhonda E. Fawcett. "Components of Manufacturers' Products Liability Based Upon Defective Packaging: Foreseeability, Superseding Cause, and Federal Preemption," Journal of Products Liability 7 (1984): 119-41.

This article discusses case law and legal aspects of manufacturers' products liability in cases of product tampering by third parties. The article discusses whether the manufacturer can be held negligent for not foreseeing criminal tampering and designing the product to thwart it, and whether a product can be considered defective under strict products liability because it does not have tamper-resistant packaging even though the product itself, without criminal intervention by a third party, is not defective. Kaplan and Fawcett discuss how much responsibility consumers have in checking packages for possible tampering and the responsibility manufacturers have in warning consumers to check packages. They also discuss the degree to which new FDA regulations on tamper-resistant packaging, if followed completely by the manufacturer, protect manufacturers from claims of negligence.

Kirschbaum, N. E. "Role of State Government in the Regulation of Food and Drugs," Food Drug Cosmetic Law Journal 38 (1983): 199-204.

State regulation of food and drugs may be more efficient in some cases and may attack problems that are not being adequately addressed on the Federal level. Cooperation and communication between industry and State government is preferred to Federal preemption for promoting regulatory uniformity.

Lave, L. B. "Controlling Contradiction Among Regulations," American Economic Review 74 (1984): 471-75.

Lave argues that when doing a benefit-cost analysis for a regulation, the regulators should take into account all externalities. Only by doing so can the total costs and benefits of a given regulation be calculated. Regulatory agencies have to cooperate to do this. Automobile regulation is used as an example of an area of regulation where conflicting public policy goals, such as minimizing fuel consumption and emissions while

simultaneously increasing safety, require a complete analysis of all externalities.

Levy, R. E. "Federal Preemption, Removal Jurisdiction, and the Well-Pleaded Complaint Rule," University of Chicago Law Review 51 (1984): 634-67.

This article discusses case law concerning when a case brought under State law and courts may be removed to Federal jurisdiction. Major factors this article considers are the scope of the plaintiff's complaint, the type of defenses anticipated or used by the defendant, and the degree to which strong Federal policy interests in areas of pervasive Federal regulation justify preemption removal, regardless of how the removal issue was raised in the case. Levy argues that a consistent posture on removal can be developed from the 1983 Supreme Court decision in the Franchise Tax Board case, although the decision itself was not explicit on all the related issues.

Mann, R. J. "Federal Jurisdiction Over Preemption Claims--A Post Franchise Tax Board Analysis," Texas Law Review 62 (1984): 893-922.

Litigants who foresee a preemption issue often seek a declaratory judgment of preemption or nonpreemption in order to clarify their rights and duties. This article discusses court treatment of the following declaratory judgment actions which raise a Federal preemption question: private party sues a State for a declaration that State law has or has not been preempted, State sues a private party for a declaration that State law has or has not been preempted, and a private party sues another private party for a declaration of preemption or nonpreemption.

Megysey, Eugene. "Governmental Authority to Regulate the Use and Application of Pesticides: State vs. Federal," South Dakota Law Review 21 (1976): 652-68.

The Federal Environmental Pesticide Control Act of 1972 (FEPCA) substantially expanded Federal control over the use, distribution, and sale of all pesticides. FEPCA raises issues of overlapping responsibility and conflict between the States and the Federal Government in two important areas. First, while FEPCA preempts the registration of all interstate and intrastate pesticides, States are authorized, with Environmental Protection Agency (EPA) approval, to register pesticides for "special local needs." Second, the statute's language appears to delegate the responsibility for certification of applicators to the States but is not clear on whether a Federal certification program is authorized in States that will not or cannot support an approved certification plan.

Merrill, R. A. "The Legal System's Response to Scientific Uncertainty: The Role of Judicial Review," Fundamental and Applied Toxicology 4 (1984): S418-S425.

All Federal public health laws delegate wide discretion to administrators to make policy choices. These administrators use both factfinding and political accommodation to formulate policies which are subject to judicial review. Merrill discusses four eras since 1970 in the scope of judicial review of risk management decisions made by health regulatory agencies. He argues that courts are becoming more aggressive in reviewing agency factfinding and that this new aggression will impede recognition and accommodation of scientific uncertainty at the agency level.

Administrators may be discouraged from developing quantitative risk assessments if the courts demand more certainty in the analysis than is possible, given available data.

New York Times. "Health Officials from 10 Eastern States Agree at Meeting to Set Level for Pesticide Ethylene Dibromide (EDB) in Some Food Products That is Far More Stringent Than Set by Federal Government," Apr. 12, 1984, sec. 1, p. 25.

Officials from 10 Eastern States met to establish common standards for EDB in some food products that were stricter than those established by the Federal Government. The States sought to establish a common standard in order to minimize consumer confusion. Meanwhile, other States in the Eastern United States had or were instituting similar or stricter standards.

Nyberg, Charles D. "The Need for Uniformity in Food Labeling," Food Drug Cosmetic Law Journal 40 (1985): 229-37.

Nyberg argues that there is a consensus that national uniformity in food product labeling requirements is desirable. The fragmented evolution of Federal food labeling laws, however, has led to differences among food products in the degree to which Federal law preempts State action. This article details these differences and makes a case for strong preemption in all areas and uniformity in regulatory procedures on the Federal and international levels.

O'Reilly, J. T. "Governor, Spare That Muffin--The Collision of Preemption With Deregulation," Federal Bar News and Journal 31 (1984): 365-70.

Deregulation in the field of product safety is unlikely. Congress will not permit retreat, and the courts have been telling agencies that the beneficiary of a Federal safety rule is entitled to continued protection. Attempts at Federal deregulation or Federal inaction put safety issues on State and local agendas, resulting in nonuniform regulation which is costly to consumers, erects effective barriers to trade, and makes subsequent Federal attempts to establish uniformity more difficult. Two case examples are EDB tolerances and communications to workers about workplace hazards. A counter example is tamper-resistant packaging where rapid FDA action, after the Tylenol tragedy, preempted the development of diverse State regulations. O'Reilly argues for early and credible use of Federal systems of risk assessment to preserve the Federal agency leadership necessary for uniform interstate commerce.

O'Reilly, J. T. "Judicial Review of Agency Deregulation--Alternatives and Problems for the Courts," Vanderbilt Law Review 37 (1984): 509-53.

Judicial review of deregulation under the Reagan administration has crystallized a trend to stronger court review of administrative rulemaking. O'Reilly discusses recent cases affecting five deregulatory devices used by agencies: (1) revocation of a regulation, (2) modification or reinterpretation of a regulation, (3) conscious nonimplementation of a requirement, (4) failure to promulgate an arguably required regulation, and (5) staying the effective date of a regulation. The Supreme Court's State Farm decision establishes a strong arbitrariness standard in reviewing such deregulatory actions, especially in the area of safety. Along with other cases, it also provides clear guidelines on the type of rulemaking record

needed by the agencies to withstand legal challenges to current deregulation or subsequent re-regulation.

Oster, S. M. "An Analysis of Some Causes of Interstate Differences in Consumer Regulations," Economic Inquiry 18 (1980): 39-54.

Oster argues that market failure is not always the reason for regulation and hypothesizes that interstate differences in consumer regulations are a result of differences in consumers' attitudes and the structure of the industries. The results of an empirical study of four different regulations support the hypothesis.

Pierce, R. J. "Regulation, Deregulation, Federalism, and Administrative Law: Agency Power to Preempt State Regulation," University of Pittsburgh Law Review 46 (Spring 1985): 607-71.

This article surveys the present judicial method of resolving when State regulation is invalidated by the commerce clause, Federal statute under the supremacy clause, or action of a Federal agency under the supremacy clause. Pierce develops an analytical framework for resolving federalism disputes that reflects the advantages and disadvantages of federalism. States should be allowed to make regulatory decisions with no geographic spillover (or with negative spillover equal in percentage to positive spillover), but they should not be allowed to make regulatory decisions with either disproportionate positive or negative geographic spillover. The application of this model should also consider relative access to expertise, the presence of an inefficient bureaucracy at the Federal and State levels, and the possible restriction of regulatory experimentation.

Rice, David A. "Product Quality Laws and the Economics of Federalism," Boston University Law Review 65 (1985): 1-64.

This article analyzes product quality laws as a case of asymmetry between principal legal and market decisionmaking institutions. While most consumer products are sold in a national market, resolution of product-related claims is largely governed by State laws. Cost differences in claims between States are not translated into parallel price differences because national marketers engage in risk pooling, thus distributing the extra costs over all customers and resulting in a transfer subsidy from consumers in less protective to more protective States. The economic model of federalism suggests that less protective States will react by passing more protective rules to stem this redistributive effect, even if such rules do not reflect the State's true protection preferences. Thus, the redistributive effects are transient, but the resulting equilibrium may be suboptimal from an efficiency perspective.

Rothschild, Donald P. "A Proposed Tonic with Florida Lime to Celebrate our New Federalism: How to Deal with the Headache of Preemption," University of Miami Law Review 38 (1984): 829-73.

The Supreme Court's application of express and implied preemption doctrines has led to confusing, uncertain, and even conflicting holdings that have impeded the States' ability to protect the health, safety, and welfare of their citizens. Citizen protection can be maximized if the Federal Government's regulations are interpreted as setting a minimum level of protection and if State regulations are permitted to supplement them.

Rothschild argues for uniform adoption of the dual compliance test outlined in the Florida Lime case for resolving preemption questions. Under this test, congressional preemption of an entire field would be required to be express and precise. In all other situations, when a State acts to supplement Federal regulation, preemption would not be held to occur unless the party claiming preemption can show that dual compliance with both Federal and State regulations is impossible.

Smith, D. J., Jr. "What Hath Rath Wrought? Federal Preemption In Food Labeling," Food Drug Cosmetic Law Journal 33 (1978): 28-34.

A California law regulating net weight labeling of food packages was challenged by Rath Packing Company and General Mills on the basis that it was preempted by Federal regulation. The Court found the California law invalid with respect to labeling of meat products because the Federal Wholesome Meat Act contains an express preemption clause. The Court also found the California law implicitly preempted with respect to flour products because the law would prevent the accomplishment of the full purposes and objectives of the Federal Fair Packaging and Labeling Act. Since the Court did not provide an implied Federal preemption for the whole field of food labeling in the Rath case, individual State laws must be analyzed on the basis of the Federal law and policy involved, congressional intent, and the practical effect of the State law or regulations.

Stribling, J. H. "Regulation of Food Labeling and Advertising by the Food and Drug Administration," Food Drug Cosmetic Law Journal 33 (1978): 4-11.

This article details sources of FDA's statutory authority over labeling and advertising, areas of shared authority with other Federal agencies, and its ability to establish definitions and standards of identity for food.

Taylor, Michael R. "Federal Preemption and Food Regulation: Where We Go From Here," Food Drug Cosmetic Law Journal 40 (1985): 221-28.

Under the Supremacy Clause of the Constitution, the Federal Government can preempt State authority by simply stating its clear intent to do so. This article discusses recent cases indicating a greater willingness of courts to let State regulations stand, even where they conflict with Federal regulations, in the absence of such clear-cut Federal intent to preempt. This willingness must be blocked if national uniformity in food regulation is to be maintained.

Taylor, M. R. "Federal Preemption and Food and Drug Regulation: The Practical Modern Meaning of an Ancient Doctrine," Food Drug Cosmetic Law Journal 38 (1983): 306-17.

Neither Federal nor State government, industry, or consumers are consistently for or against Federal preemption; each uses the arguments it provides as best it can to achieve its immediate goals. Judicial opinions are most complicated in cases of State exercise of traditional police powers in the absence of express Federal preemption. Here the courts assess whether State law is an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. This article discusses the likely validity of FDA's assertion of preemption of differing State laws in its 1982 regulations on pregnancy/nursing warning labels on over-the-counter drugs and tamper-resistant packaging.

Turner, Alan. "The Development and Structure of Food Legislation in the United Kingdom and its Interaction with European Community Food Laws," Food Drug Cosmetic Law Journal 39 (1984): 430-44.

This article discusses the history and development of United Kingdom (U.K.) food law and the procedures by which regulations are implemented. The article also discusses the relationship of U.K. law and the EEC. The U.K. has resisted many EEC efforts to harmonize the food laws of member States in part because U.K. law is based on general principles and subsequent legal precedent, while efforts of other member States are based on codified law which lacks the flexibility of the broader approach. The EEC has shifted from compulsory harmonization to optional harmonization. This shift raises the possibility of the erection of a new series of nontariff barriers due to variation in regulations from State to State.

U.S. Supreme Court. Florida Lime and Avocado Growers, Inc. v. Paul. 373 U.S. 132, 83 S. Ct. 1210, 10L. Ed. 2d 248 (1963).

This record is the Supreme Court's decision in a case brought by Florida avocado growers against a California law requiring an 8-percent oil content in avocados before sale. The Court found that Federal marketing regulations did not preempt the California law because the subject matter did not demand exclusive Federal regulation and the State had a legitimate interest in regulating the sale of food products.

Verkuil, P. R. "Preemption of State Law by Federal Trade Commission," Duke Law Journal 1976 (1976): 225-47.

Verkuil argues that FTC preemption of States' rights will increase the competitiveness of market economies. The FTC's right of preemption is based on Parker versus Brown, the legislative intent of Congress, and the court's interpretation of the FTC's legal jurisdiction. Avoidance of conflict between States' rights and Federal protectionism remains the primary boundary issue concerning the increased use of Federal preemption.

Young, J. H. "Federal Trade Commission and the States' Search for Regulatory Authority," Federal Bar Journal 38 (1979): 1-20.

Few cases have considered the FTC Act's application to State regulatory programs that have anticompetitive effects. Young argues that case law concerning the Sherman Act, particularly the Parker case, suggests that the FTC Act's coverage, like that of other Federal antitrust laws, does not extend to State-mandated programs which replace competition with State-supervised regulation. Thus, proposed rulemaking by the FTC in the late seventies that would preempt State regulation of consumer goods and services advertising, milk pricing, and the professions is likely to be invalid. Such State action must instead be held accountable under the 1st amendment and commerce clause of the U.S. Constitution and State antitrust laws.

Zimmerman, J. F. "Federal Preemption--A Recommended ACIR Research Agenda," Publius--The Journal of Federalism 14 (1984): 175-81.

Congress created the U.S. Advisory Commission on Intergovernmental Relations (ACIR) in 1959 to research the relations of governments in the American Federal system. The sharp increase in Federal preemptive action,

both complete and partial, in the last two decades has reduced significantly the traditional discretionary authority of State and local governments, and affected power relationships in the Federal system. Although the Supreme Court has clarified congressional intent regarding preemption on a case-by-case basis, confusion still reigns in many functional areas. This confusion and the relative inability of Federal preemptive statutes to achieve their goals are the bases for Zimmerman's arguing for an indepth study of the effect of preemption and alternative approaches for the attainment of national goals.

Other Areas of Regulation

This section deals with articles that analyze relevant preemption issues in such areas of regulation as environmental and worker safety laws.

Ackerman, M. S. "Preemption of State Health Care Laws and Worker Well-Being," University of Illinois Law Review 4 (1981): 825-67.

The Employee Retirement Income Security Act, passed in 1974 to protect workers against abuses in welfare benefit and retirement plans, contains a broad preemption of "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan...." Ackerman discusses four ways in which the courts have interpreted the scope of this preemption. He argues that a too broad interpretation has hurt workers by blocking States from furthering legitimate and significant State interests through State laws such as comprehensive health care plans.

Butters, R. D. "Constitutional Law--Interstate Commerce, Federal Regulations Requiring States to Enact Statutes Enforcing Federal Air Pollution Control Programs Exceed Commerce Power by Intruding Upon State Sovereignty Protected by the 10th Amendment," Vanderbilt Law Review 29 (1976): 276-87.

This article discusses several court cases related to implementation of the Federal Clean Air Act. The cases focus on the ability of the Federal Government to require States to enforce and administer Federal air quality control regulations. Such requirements may exceed congressional power under the commerce clause by intruding on State sovereignty protected by the 10th amendment.

Choi, Y. H. "Issues of New Federalism in Low-Level Radioactive Waste Management: Cooperation or Confusion?" State Government 57 (1984): 13-20.

The Low-Level Radioactive Waste Policy Act (1980) creates a new federalism under which a State is responsible for providing waste disposal capacity for low-level waste generators operating within its borders. Many States have assumed this responsibility by forming regional interstate compacts. This article discusses problems in interpretation, enforcement, and preemption arising out of this new form of federalism and State challenges to Federal dominance of regulation of other aspects of the nuclear industry.

Cohen, Alan M. "Statutory Preemption of Federal Common Law: Milwaukee v. Illinois," Washington University Journal of Urban and Contemporary Law 24 (1983): 245-60.

This article deals with the basic question of whether a statutory Federal law preempts a common Federal law. Prior to the Federal Water Pollution

Control Act Amendment (FWPCAA), interstate water pollution was dealt with under the Federal common law of nuisances. The Supreme Court ruled that FWPCAA should replace standards set under the common law which were in some cases stricter.

Coleman, K. D. "Federal Preemption of State Law Prohibition on the Exercise of Due-on-Sale Clauses," Bank Law Journal 100 (1983): 772-806.

Section 341 of the Garn-St. Germain Depository Institutions Act of 1982 preempts State laws prohibiting the exercise of due-on-sale clauses on real property loans by all lenders. This article also includes several exceptions to its general approval of these clauses which preempt State laws allowing due-on-sale clauses in the excepted cases. The article discusses the implementation of this act through Bank Board regulations and related court cases.

Daniel, John E. (ed.). "The Balance of Roles: EPA and the States under the Reagan Administration," Environmental Law Reporter 12 (1982): 15087-91.

Under the Reagan administration, the EPA has acted to transfer some of its responsibilities for administering environmental programs to the States. This article pinpoints some of the philosophical arguments for doing this (new federalism) and gives an overview of the role the EPA should play and where the States should be responsible.

Dellecker, Robert. "Preemptive Scope of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980: Necessity for an Active State Role," University of Florida Law Review 34 (1982): 635-58.

Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980 to respond to the problem of inactive hazardous waste sites and to finance their cleanup. The act encourages a joint venture between States and the Federal Government in addressing the problem, but ambiguous statutory language undermines this policy by seemingly preempting States from establishing local programs. The article analyzes the relationship between the Federal and State governments in administering CERCLA's joint policy, with an emphasis on the Federal legislation's preemptive scope and Federal court doctrines for interpreting this scope.

Graham, S. A. "The Nuclear Waste Policy Act of 1982: A Case Study in American Federalism," State Government 57 (1984): 7-12.

This article explains the legal and constitutional background of Federal-State relations, with respect to high-level radioactive waste management. The article also explores the balance between Federal and State authorities over nuclear waste created by the Nuclear Waste Policy Act of 1982 and uncertainties about the effectiveness of this act.

Gross, Charles R. "Federal Preemption--The Consumer Product Safety Act of 1976 and Its Effect on Wisconsin Law," Wisconsin Law Review 3 (1977): 813-37.

The Consumer Product Safety Act of 1972 as amended in 1976 is very extensive and does not leave much room for State regulation in this area. Further, States do not have the necessary resources to formulate and

implement safety standards. This article discusses what Wisconsin has done in this area and, in general, what States can do without risking preemption.

Horn, K. H. "Federal Preemption of State Transportation Economic Regulation--Conflicts versus Coordination," Transportation Journal 23 (1983): 28-46.

After years of conflict between Federal and State regulations, recent Federal deregulation of interstate airlines, railroads, and motor carriers of passengers has preempted independent State economic regulation of transportation. The rationale for preemption has usually been the desirability of uniform regulation and the degree to which State regulations discriminate against interstate commerce. In the transportation area, however, no estimates of the resource savings attributable to Federal preemption exist nor are Federal preemption's ultimate implications well understood.

Jarrell, G. A., and M. Bradley. "The Economic Effects of Federal and State Regulations of Cash Tender Offers," Journal of Law and Economics 23 (1980): 371-407.

The Federal Williams Act (1968) and acts passed by 36 States during the seventies govern acquisitions of firms via cash tender offers. Their purpose is to protect target shareholders by giving them more time to react to tender offers. Jarrell and Bradley argue that these acts have resulted in higher stock premiums for target shareholders but have also impeded the efficient functioning of the takeover market causing social costs. A model is presented and tested which separates and evaluates the effects of concurrent Federal and State laws on cash tender offers.

Libecap, Gary D., and Steven N. Wiggins. "The Influence of Private Contractual Failure on Regulation: The Case of Oil Field Unitization," Journal of Political Economy 93 (1985): 690-714.

This article uses oil field unitization in Oklahoma, Texas, and Wyoming (Federal lands) in 1948-75 as a case study and analyzes the interdependence between Federal and State regulatory responses and private contractual failure. The feasible range of government regulation is restricted by the same forces that block private agreement: different stages of oil field development, firm and lease heterogeneities, and information problems regarding lease value estimates. Only Federal regulation is effective because it surmounts the information problems. Libecap and Wiggins argue that State regulation is less effective because it is more strongly influenced by small firms that benefit from nonunitized production.

Renz, J. T. "Effect of Federal Legislation on Historical State Powers of Pollution Control: Has Congress Muddied State Waters?" Montana Law Review 43 (1982): 197-216.

This article surveys Federal legislation in the environmental field to chart the shift of traditional police powers to protect the health and welfare of citizens from the States to Federal administrative agencies. Court decisions in the Milwaukee and other water pollution cases indicate that the comprehensive nature of this Federal regulation precludes Federal common law nuisance remedies and State-based relief for interstate or intrastate pollution. Renz argues that such blanket preemption is

undesirable and that the flexibility embodied in traditional common law actions should be retained.

Rotunda, R. D. "The Doctrine of Conditional Preemption and Other Limitations of the 10th Amendment Restrictions," University of Pennsylvania Law Review 132 (1984): 289-325.

This article reviews recent Supreme Court decisions concerning the extent to which the 10th amendment limits congressional power under the commerce clause. Prior to the National League of Cities case in 1976, the court consistently rejected 10th amendment attacks on congressional regulation of the activities of State and local government entities when the challenges were based on an asserted interest in State autonomy. The 1976 case seemingly resurrected a State sovereignty limitation on the Federal commerce power, but this ruling was narrowed by subsequent Court decisions. The 5-to-4 majorities in these cases and the arguments contained in the dissents make the future interpretation of the issue unclear. Rotunda argues that the central factor in such cases should be whether the preemption is conditional, thus leaving the States some choice of action.

Strohbehn, Edward L. (ed.). "The Bases for Federal-State Relationships in Environmental Law," Environmental Law Reporter 12 (1982): 15074-87.

A Federal-State relationship is established by statute for implementing almost every Federal environmental program. These relationships vary greatly but usually involve voluntary State participation with the Federal Government taking responsibility where a State choose not to participate. Given this structure, the new federalism of the Reagan administration may perversely produce greater Federal responsibility for environmental regulatory programs if States choose to get out of programs where Federal support is lowered, thus returning full responsibility to the Federal Government.

Thompson, F. J., and M. J. Scicchitano. "State Implementation Effort and Federal Regulation Policy: The Case of Occupational Safety and Health," Journal of Politics 47 (May 1985): 686-703.

Systematic examinations of variations in State implementation efforts under Federal regulations that encourage State involvement are scarce. This article explores the degree to which four theories (wealth of State, dominant political party, interest group pressure, and problem severity) explain variations in State participation and enforcement rigor under the Occupational Safety and Health Act (OSHA). The article explains that the States vary substantially in implementation effort, with some enforcement levels being lower and some higher than OSHA achieves in States where it holds direct jurisdiction. The article focuses on the utility of wealth, pressure group, and problem severity theories in accounting for enforcement rigor. To a lesser degree, Thompson and Scicchitano suggest the relevance of the dominant political party and regionalism for explaining State participation.

FOOD PRODUCT SAFETY AND QUALITY REGULATION: A GENERAL BIBLIOGRAPHY

This section cites literature on economic, legal, and public health research on individual areas of food product safety and quality regulation. The focus is on the formulation, operation, and effect of Federal and State regulations of food products.

Regulatory Theory and Effects

This section deals with comprehensive food law texts and regulatory theory and effects. It also cites discussions of the use of benefit-cost and risk assessment analysis in regulatory actions.

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APPENDIX--GLOSSARY OF AGRICULTURAL AND OTHER TERMS

Benelux. - A short name for Benelux Economic Union, an economic union of Belgium, Netherlands, and Luxembourg established by treaty in 1958.

Bureau of Alcohol, Tobacco and Firearms (BATF). - A Department of the Treasury bureau which regulates the alcohol, explosives, and firearms industries and determines taxes for cigarettes and cigars. It also ensures collection of Federal alcohol and tobacco excise taxes.

Codex Alimentarius Commission. - A joint commission established by the United Nations' Food and Agriculture Organization and World Health Organization to develop highly detailed international food standards for participating governments.

Comprehensive Environmental Response, Compensation, and Liability Act. - An act passed by Congress in 1980 that empowered the Federal Government through the Environmental Protection Agency to impose liability for and help finance cleanup of abandoned hazardous waste disposal sites (also known as Superfund).

Daminozide. - A plant growth regulator mainly used by producers to control the vegetative growth of fruit trees and to enhance fruit quality (also known as Alar^{tm}).

Employee Retirement Income Security Act (ERISA). - An act passed by Congress in 1974 to protect participants of employee benefit plans and their beneficiaries from abuses in retirement plans. Protection is achieved through mandated substantive and administrative regulations.

Environmental Protection Agency (EPA). - An independent regulatory agency in the executive branch of the Federal Government established by Congress in 1970. Its primary function is to control pollution of the Nation's air, water, and land resources by wastes, noise, radiation, and toxic substances.

Ethylene dibromide (EDB). - A fumigant used as a means of protecting stored wheat, corn, and other grains against destruction by insects and contamination by molds and fungi; as a treatment for a small percentage of fruits to conform with quarantine regulations against the spread of fruit flies; and as a tool to free milling machinery of insects.

European Economic Community (EEC). - The European Common Market formed in 1958 by Belgium, France, West Germany, Italy, Luxembourg, and the Netherlands, and joined by Denmark, Ireland, and the United Kingdom in 1973, Greece in 1981, and Spain and Portugal in 1986.

Federal Environmental Pesticide Control Act (FEPCA). - An act passed by Congress in 1972 that amended the Federal Insecticide, Fungicide, and Rodenticide Act of 1947. It expanded Federal authority to cover the use, shipment, distribution, and sale of all pesticides.

Federal Trade Commission (FTC). - An independent regulatory agency established by Act of Congress in 1914. It enforces section 5 of the Federal Trade Commission Act, which is a general ban on "unfair methods of competition" and the Clayton Act and litigates those acts or practices alleged to be unfair or deceptive to consumers.

Federal Water Pollution Control Act Amendment (FWPCAA). - An act passed by Congress in 1972 that amended the Federal Water Pollution Control Act of 1956. It authorized qualified State agencies to establish new water quality standards in conformance with Environmental Protection Agency regulations.

Food and Agriculture Organization (FAO). - An organization established by the United Nations to raise levels of nutrition and standards of living, secure improvements in the efficiency of production and distribution of food and agricultural products, improve the condition of rural populations, and contribute to an expanding world economy and humanity's freedom from hunger.

Food and Drug Administration (FDA). - A scientific, regulatory agency within the U.S. Department of Health and Human Services that is responsible for the safety of the Nation's foods, cosmetics, drugs, biologics, medical devices, and radiological products.

New federalism. - The view of the Reagan administration that the Federal Government has too much power and that this power should be diminished by a greater reliance on the free market and a stronger role for the States in governing their citizenry.

World Health Organization (WHO). - An organization established by the United Nations to attain good health, through directing and coordinating international health work and providing assistance.

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